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In the Supreme Court of the United States

OCTOBER TERM, 1975

No.

UNITED STATES OF AMERICA, PETITIONER

v.

STEVE KARATHANOS and JOHN KARATHANOS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is not yet reported. The opinion of the district court (App. C, *infra*) is reported at 399 F. Supp. 185.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on February 2, 1976. On Febru-

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ary 24, 1976, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including April 2, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Fourth Amendment exclusionary rule should be applied to bar the admission of evidence, obtained in good faith by federal law enforcement officers executing a facially valid search warrant issued by a federal magistrate, because the warrant is ultimately held to have been erroneously issued.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

8 U.S.C. 1324 and 1325 are set forth in relevant part in Appendix D, *infra*.

STATEMENT

1. On May 16, 1975, agents of the Immigration and Naturalization Service (INS) obtained a war-

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rant (App. E, *infra*) from a magistrate of the United States District Court for the Eastern District of New York for the search of Steve's Pier I Restaurant in Bayville, New York. The warrant, which was issued for the purpose of seizing aliens who had illegally entered the United States in violation of 8 U.S.C. 1325 and who allegedly worked and lived in the subject premises, was based upon the affidavit (App. F, *infra*) of Neil Jacobs, a criminal investigator of the INS. In his affidavit, Agent Jacobs stated that (1) during the past five years at least eleven named illegal aliens had been apprehended on the premises of the restaurant and (2) on May 15, 1975, Athanasios Athanasiou, an admitted illegal alien who had surrendered himself to the INS, had stated to Jacobs that he had been employed at Steve's Pier I Restaurant from October 1973 to May 11, 1975, that as of May 11, 1975, at least eight other persons known to Athanasiou to be illegal aliens were employed at the restaurant, that during the previous year and a half he had resided in the basement of the restaurant with eleven other individuals in six foot by six foot cubicles, and that at least six of the eleven individuals were known to him to be illegal aliens (*id.* at 50a-51a).

The search authorized by the warrant resulted in the arrest of seven illegal aliens by INS agents. On May 29, 1975, respondents Steve Karathanos, the president and sole shareholder of the corporation that owns the restaurant, and John Karathanos, his brother and a chef at the restaurant, were indicted by a grand jury of the United States District Court

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for the Eastern District of New York on eight counts of willfully and knowingly harboring and concealing an alien not lawfully entitled to reside in the United States, in violation of 8 U.S.C. 1324(a)(3).

2. Respondents moved prior to trial to suppress the evidence obtained by the search, including the testimony of the aliens, on the ground that the search warrant issued by the United States Magistrate was not based upon information adequate to establish probable cause (App. C, *infra*, pp. 33a-34a). The district court granted the motion, holding that the assertions in the affidavit of Agent Jacobs failed to set forth adequately the source of the informant's conclusion that the aliens were illegally in this country or why the informant was credible (App. C, *infra*, p. 44a).

The government appealed the suppression order to the United States Court of Appeals for the Second Circuit, and a divided panel of that court affirmed (App. A, *infra*). The majority agreed with the district court that the affidavit of the INS agent had insufficiently furnished the underlying facts and circumstances from which the magistrate could determine probable cause, because it failed to set forth how the informant knew that the men with whom he had roomed in the basement of respondents' restaurant had entered the United States illegally (*id.* at 7a-9a). The court also rejected the government's contention that the Fourth Amendment exclusionary rule should not be applied to exclude probative and unquestionably reliable evidence secured pursuant to a search

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warrant that had been issued by a neutral and detached magistrate and had been executed in good faith by federal law enforcement officers (*id.* at 13a-18a).[1] The court reasoned that continued application of the suppression remedy in such circumstances is desirable because it will "induce [magistrates] to give search warrant applications the scrutiny which a proper regard for the Fourth Amendment requires" (*id.* at 16a) and that, in any event, adoption of the government's position was foreclosed by decisions of this Court in which the exclusionary rule had been applied to evidence seized pursuant to defective warrants. "[W]e continue to believe," the court of appeals stated, "that the Supreme Court should retain the exclusive privilege of overruling its own decisions" (*id.* at 15a).

Judge Van Graafeiland dissented. He concluded that the informant's statements in the affidavit, as corroborated by the arrest of several illegal aliens at the restaurant in the past and when tested and interpreted "in a commonsense and realistic fashion," *United States* v. *Ventresca*, 380 U.S. 102, 108, were sufficient for the magistrate to find that probable cause for a search existed (App. A, *infra*, pp. 24a-

[1] The court of appeals mistakenly implied that the exclusionary rule issue had not been raised in opposition to the motion to suppress in the district court (App. A, *infra*, p. 13a). Although this claim had not been briefed in the government's memorandum of law in the district court, it had been presented during oral argument (Supp. Tr. 35-36). Nevertheless, the district court did not address the issue in ruling on respondents' motion to suppress.

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26a.) Furthermore, assuming that the warrant had been issued without probable cause, Judge Van Graafeiland found application of the exclusionary rule inappropriate as a matter of policy and inconsistent with the tenor of recent decisions of this Court emphasizing that the drastic remedy of exclusion is to be reserved for those instances in which it is most efficacious in conforming police conduct to constitutional norms.

REASONS FOR GRANTING THE WRIT

This case presents what is in our view one of the principal contemporary issues in the administration of the exclusionary rule—the appropriateness and efficacy of suppression of evidence seized pursuant to a search warrant obtained from a neutral and detached magistrate in good faith, when the showing made in support of the warrant application falls short of establishing probable cause. It is an issue respecting which this Court has recently granted certiorari and heard argument, *Wolff* v. *Rice*, No. 74-1222, certiorari granted, 422 U.S. 1055. The decision in *Wolff*, however, may rest upon other grounds (the availability of relief under 28 U.S.C. 2254 to state convicts raising Fourth Amendment claims that have been considered and rejected by the state courts), or this issue may be dealt with in such a fashion as to leave unresolved important aspects thereof, such as the application of the pertinent principles to federal prosecutions. In either event, this case affords the Court an excellent vehicle for considering this im-

portant aspect of exclusionary rule policy to the extent it remains unsettled.[2]

Acceptance of the position we urge in this case will, we submit, enhance the sound administration of the criminal justice system while at the same time fostering our citizenry's enjoyment of the rights protected by the Fourth Amendment by increasing the incentives for law enforcement officers to submit their actions to advance scrutiny by independent judicial officers—a course whose value this Court has time and again stressed. See, *e.g.*, *Gerstein* v. *Pugh*, 420 U.S. 103, 112-113; *Katz* v. *United States*, 389 U.S. 347, 358; *Jones* v. *United States*, 362 U.S. 257, 270-271.

1. The judicially created exclusionary rule does not "provide that illegally seized evidence is inadmissible against anyone for any purpose." *Alderman* v. *United States*, 394 U.S. 165, 175. Because the rule is irrelevant to the trustworthiness of the fact-finding process and imposes substantial societal costs, its application has been carefully limited to "those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, 414

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[2] We believe there is substantial doubt about the correctness of the other component of the court of appeals' holding—that the affidavit was insufficient to establish probable cause. Since that question basically involves the application of general principles to the particular facts of this case, however, we are not seeking review of it by this Court.

U.S. 338, 348. Numerous decisions of this Court[3] have thus recognized that blind adherence to the rule is neither necessary nor wise when such a course would not advance the rule's principal objective—compelling "respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins* v. *United States*, 364 U.S. 206, 217.

Whatever the validity of this justification for the exclusionary rule in instances where law enforcement officers have conducted warrantless searches and seizures for the purpose of making evidentiary use of the items seized,[4] there can be no plausible justification, consistent with its stated purposes, for the rule's unyielding application once advance judicial authorization for the search has been obtained in good faith from a neutral and detached magistrate. As the Court noted in *Michigan* v. *Tucker*, 417 U.S. 433, 447:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negli-

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[3] See, *e.g.*, *United States* v. *Peltier*, 422 U.S. 531; *Oregon* v. *Hass*, 420 U.S. 714; *Michigan* v. *Tucker*, 417 U.S. 433; *Brown* v. *United States*, 411 U.S. 223; *Harris* v. *New York*, 401 U.S. 222; *Desist* v. *United States*, 394 U.S. 244; *Linkletter* v. *Walker*, 381 U.S. 618; *Walder* v. *United States*, 347 U.S. 62.

[4] See Kaplan, *The Limits of the Exclusionary Rule*, 26 Stan. L. Rev. 1027 (1974); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970); Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. Pa. L. Rev. 378 (1964).

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> gent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

Similarly, in *United States* v. *Peltier*, 422 U.S. 531, 542, the Court stated:

> If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.

The record in this case vividly illustrates the unreasonableness of applying the rule to exclude the unquestionably probative and reliable evidence uncovered by the INS search. Rather than acting on their own initiative based on the information supplied by an informant with recent, first-hand knowledge, the agents sought and obtained a search warrant in good faith from a United States Magistrate[5] and properly executed the warrant in the belief that it was valid. Although several months later the dis-

[5] Neither the district court nor the court of appeals suggested that the INS agents or the United States Magistrate had acted in bad faith or that the magistrate had not approached his duties seriously and impartially.

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trict court and a majority of the court of appeals concluded that the showing of probable cause had been insufficient, their disagreement with the magistrate related only to the permissible factual inferences that could be drawn from the supporting affidavit; this was not a case, like *Spinelli* v. *United States*, 393 U.S. 410, in which the police sought to rely upon a wholly unsubstantiated tip. Indeed, not only was the question of probable cause here fairly disputable—a frequent occurrence in the "grey, twilight area" of the Fourth Amendment, "where the law is difficult for courts to apply, let alone for the policeman on the beat to understand," *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 269 (Powell, J., concurring)—but two of the five judges to have scrutinized the affidavit believed it to be sufficient. We submit that the remedial values of the exclusionary rule are not furthered by its application to what was at most an error of judgment by the issuing magistrate in an area where precise rules of law are frequently not discernible.

2. Discriminating invocation of the exclusionary rule when a warrant has been obtained also would provide a substantial incentive for law enforcement officers to utilize the preferred warrant procedure.*

* In this case, for instance, the officers searched respondents' premises for the purposes of making what they believed to be probable cause arrests. Under New York and Second Circuit law, it does not appear that a warrant was an essential prerequisite to such action (see *United States* v. *Fernandez*, 480 F.2d 726, 740, n. 20), and the decision to seek one is thus further evidence of the officers' good faith.

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See *Aguilar* v. *Texas*, 378 U.S. 108, 110-111. Unlike instances in which the police have acted without judicial authorization and in which an exclusionary rule is perhaps the only meaningful deterrent to misconduct, resort to the warrant procedure itself provides a substantial alternative barrier to unreasonable or otherwise defective searches and seizures. See *Jones* v. *United States*, *supra*, 362 U.S. at 270-271; *Johnson* v. *United States*, 333 U.S. 10, 14; *United States* v. *Lefkowitz*, 285 U.S. 452, 464. For this reason the Court has recognized that not all errors of judgment by a magistrate should be treated in the same manner as Fourth Amendment violations by law enforcement officers acting without judicial supervision and approval. *United States* v. *Ventresca*, *supra*, 380 U.S. at 106; *Aguilar* v. *Texas*, *supra*, 378 U.S. at 111.

We do not suggest that the exclusionary rule is never appropriate when a search has been conducted pursuant to a warrant, or that the mere issuance of a warrant forecloses further inquiry into the existence of probable cause. Even when a warrant has been obtained, suppression of evidence may be justified if the factors relied on by the magistrate "were so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," *Brown* v. *Illinois*, 422 U.S. 590, 610-611 (Powell, J., concurring),[7] or if the warrant had been procured

[7] "[T]he object of deterrence would be sufficiently achieved if the police were denied the fruit of activity intentionally or flagrantly illegal—where there was no reasonable cause to

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in bad faith or on the basis of material misrepresentations.[8] Application of the rule in such circumstances would be consistent with its historic underpinnings and would encourage obedience to the constitutional commands. As Professor Amsterdam has written, however, "the rule is a needed, but grudgingly taken, medicament; no more should be swallowed than is needed to combat the disease." Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. Pa. L. Rev. 378, 389 (1964).

3. Once it has been acknowledged that the exclusionary "rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally

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believe there was reasonable cause." Friendly, *Benchmarks* 261 (1967).

[8] See, *e.g.*, *United States* v. *Luna*, 525 F.2d 4 (C.A. 6), certiorari denied, No. 75-818, March 22, 1976; *United States* v. *Belculfine*, 508 F.2d 58 (C.A. 1); *United States* v. *Marihart*, 492 F.2d 897 (C.A. 8); *United States* v. *Carmichael*, 489 F.2d 983 (C.A. 7); *United States* v. *Thomas*, 489 F.2d 664 (C.A. 5).

The affidavit here was evidently inaccurate in stating that Athanasiou had been employed at the restaurant and had lived in its basement for a year and a half. The informant actually had worked in the restaurant for five months and had resided on the premises for two months prior to the search; before moving into the restaurant he had lived for three months at a house not far from the restaurant with three other illegal aliens. Respondents argued to the court of appeals that these inaccuracies reflected bad faith on the part of the agent in applying for the warrant; the United States contended that the inaccuracies were inadvertent and immaterial. In light of its disposition of the case, the court of appeals did not reach this issue (App. A, *infra*, p. 14a). The question would be open on remand if this Court were to reverse the judgment below.

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through its deterrent effect, rather than a personal constitutional right of the party aggrieved," *United States* v. *Calandra*, *supra*, 414 U.S. at 348, strict adherence to the rule is both unnecessary and unwise when suitable and efficacious substitute remedies, less costly to society, are available. A United States Magistrate, unlike a law enforcement officer, is subject to the control and direction of the district court and may be removed by the court for "incompetency, misconduct, neglect of duty, or physical or mental disability." 28 U.S.C. 631(h). If it appears that a particular magistrate is serving merely as a "rubber stamp" or has demonstrated an inability to exercise mature judgment, a remedy is available that is far more direct and effective, and less costly to the criminal justice system, than the suppression of evidence in a later proceeding. Indeed, while a law enforcement officer will normally be aware of and concerned by a lost prosecution, a magistrate has no similar personal stake in the outcome of a criminal trial and may even be uninformed of a suppression order. In such instances there is no appreciable systemic value derived from utilization of the "blunt instrument" of the exclusionary rule.

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CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

KENNETH S. GELLER,
Assistant to the Solicitor General.

JEROME M. FEIT,
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APRIL 1976.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 550—September Term, 1975

(Argued December 16, 1975
Decided February 2, 1976)

Docket No. 75-1322

UNITED STATES OF AMERICA, APPELLANT

—against—

STEVE KARATHANOS AND JOHN KARATHANOS, APPELLEES

Before: MANSFIELD, OAKES and VAN GRAAFEILAND, *Circuit Judges.*

Appeal from a memorandum decision and order of the United States District Court for the Eastern District of New York, James L. Watson, *Judge,** finding no probable cause for the issuance of a search

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* Of the United States Customs Court, sitting by designation.

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warrant, and ordering the suppression of evidence and testimony of illegal aliens obtained as a result of the search.

Affirmed.

EDWARD R. KORMAN, Chief Assistant, United States Attorney's Office (David G. Trager, United States Attorney for the Eastern District of New York, Brooklyn, N.Y., of counsel), *for Appellant.*

STANLEY H. WALLENSTEIN, Esq., New York, N.Y. (Schiano & Wallenstein, New York, N.Y., of counsel), *for Appellees.*

MANSFIELD, *Circuit Judge*:

On this appeal from a decision of the United States District Court for the Eastern District of New York ordering the suppression of certain evidence and testimony as obtained in violation of appellees' Fourth Amendment rights, the government asks us to reverse a decision by Judge James L. Watson * that there was no probable cause to issue the search warrant in question or, alternatively, to restrict the operation of the exclusionary rule in this case. Since we find that the warrant was improperly issued, and are unpersuaded by the government's arguments regarding the exclusionary rule, we affirm the decision below.

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* Of the United States Customs Court, sitting by designation.

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The case involves a search of Steve's Pier One Restaurant in Bayville, N.Y.; appellee Steve Karathanos is the president and sole shareholder of the corporation which owns the restaurant, while appellee John Karathanos, his brother, works there as a chef. The search was conducted under authority of a search warant issued by a United States Magistrate after Neil Jacobs, an investigator for the Immigration and Naturalization Service ("INS") swore in an affidavit that he had reason to believe illegal aliens were on the restaurant's premises. The affidavit reads, in pertinent part, as follows:

> "Upon information and belief, there are a number of aliens who are not lawfully entitled to enter or reside within the United States, employed at and present within the premises known and operated as STEVE'S PIER I RESTAURANT, 33 BAYVILLE AVENUE, BAYVILLE, NEW YORK, within the Eastern District of New York. The presence of said aliens is a violation of Title 8, United States Code, Section 1325.[1] Moreover,

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[1] Title 8 U.S.C. § 1325 reads as follows:

"§ 1325. *Entry of alien at improper time or place; misrepresentation and concealment of facts*

"Any alien who (1) enters the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) obtains entry to the United States by a willfully false or misleading representation or the willfull concealment of a material fact, shall, for the first commission of any such offenses, be guilty of a misdemeanor and upon conviction thereof be punished by imprisonment for not more than six months, or by a fine

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such aliens are subject to arrest pursuant to Title 8, United States Code, Section 1325, for having unlawfully entered the United States.

"The source of your deponent's information and the grounds for his belief are:

"1. During the past five years at least eleven illegal aliens have been apprehended on the premises known as STEVE'S PIER I RESTAURANT, 33 BAYVILLE AVENUE, BAYVILLE, NEW YORK, including but not limited to the following individuals: MICHAEL KATSIGIORGIS, DIMITRIOUS STROUPAS, EMANUEL ARETINES, VELRIS KOSTAS, VICTOR LLANOS, KOASTANTINOS VOULGARIDIS, ROBERTO BARRENCHEA-CAMACHO, VICTOR ALEXANDRO LLANOS-ATUNEA, LADIGLAO VENEGAS-FLORES, HUGO LAGOS, and KIKOLOS TISSANOS.

"2. On May 15, 1975, one ATHANASIOS ATHANASIOU, an admitted illegal alien, holding Greek citizenship, surrendered himself to agents of the Immigration and Naturalization Service at 20 West Broadway, New York, New York. After being advised of his rights, Mr. Athanasion advised that he had been employed at STEVE'S PIER I RESTAURANT, 33 BAYVILLE AVENUE, BAYVILLE, NEW YORK from October of 1973 till Sunday, May 11, 1975; that as of May 11, 1975 at least eight other persons known to him to be illegal aliens were employed at STEVE'S PIER 1 RESTAURANT, 33 BAYVILLE AVENUE, BAYVILLE, NEW

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of not more than $500, or by both, and for a subsequent commission of any such offenses shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not more than two years, or by a fine of not more than $1,000, or both."

YORK. That during the last year and a half he has resided in the basement of said restaurant with eleven other individuals in six (6) foot by six (6) foot cubicles. That at least six of the eleven individuals residing in the basement at 33 Bayville Avenue, Bayville, New York are known to him to be illegal aliens."

Having obtained the warrant, INS agents searched the restaurant and arrested seven illegal aliens on the premises. The Karathanos brothers were then indicted for harboring and concealing these aliens in violation of 8 U.S.C. § 1324.[2] The appellees moved to exclude from their trial any evidence of the presence of the aliens obtained during the search, and the testimony of the aliens themselves, on the ground that the affidavit for the search warrant failed to state probable cause to search. After a hearing, Judge Watson granted the motion, and the government, deeming the excluded evidence essential to its prosecution of the Karathanos brothers, appealed pursuant to 18 U.S.C. § 3731.

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[2] Title 8 U.S.C. § 1324 reads in pertinent part as follows:

"Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—

* * * *

"(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation; . . . shall be guilty of a felony. . . ."

Discussion

Though fine judgments are often required to determine whether an affidavit states facts sufficient to show probable cause for issuance of a search warrant, the basic standard for the decision is well-settled. When an affidavit relies on an informant's time to establish probable cause, the affidavit must, first, set forth "some of the underlying circumstances" forming the basis of the informant's conclusion that there is illegal activity or evidence thereof on the premises, and, second, it must state facts which give some assurance that the informant is a credible person. See *Spinelli* v. *United States*, 393 U.S. 410 (1969); *Aguilar* v. *Texas*, 378 U.S. 108 (1964). The purpose of the "two-pronged" test thus enunciated in *Aguilar* and *Spinelli* is, of course, to assure that the magistrate will not function merely as a rubber stamp but will issue search warrants only when the facts are sufficient to satisfy a reasonably prudent detached and neutral person that a crime is being committed or evidence of it kept on the premises to be searched and that the informant's information has been obtained by him in a reasonably reliable way rather than through neighborhood gossip, conjecture, or mere suspicion. See *Spinelli* v. *United States*, *supra*, 393 U.S. at 416. Then only is a limited invasion of a person's privacy sanctioned by the Fourth Amendment.

With this basic framework in mind, we turn our attention to whether the requirements of the first phase of the *Aguilar-Spinelli* test have been met. The

only information presented in the Jacobs affidavit [3] to indicate how the informant Athanasiou reached his conclusion that there were illegal aliens at the restaurant is the statement that he had lived on the premises with these aliens. The government, recognizing that the mere presence of aliens (assuming that Athanasiou had a basis for concluding they *were* aliens) would not provide a basis for concluding that they had entered the United States illegally or otherwise violated immigration laws, strenuously argues that his statement gives rise to a reasonable inference that the other aliens must have admitted to him their illegal status, and thus provides sufficient assurance that he reached his conclusion in a reliable way.

Unquestionably statements to the informant by the other aliens that they were illegally in the United States would have been sufficient to support a holding that the information was reliably obtained by the informant. See, e.g., *United States* v. *Sultan*, 463 F.2d 1066, 1068 (2d Cir. 1972). But the affidavit's bald statement that Athanasiou had lived with the other aliens is an insufficient basis for inferring that they made such incriminating admissions. While co-workers and bunkmates may exchange considerable amounts of information, it can hardly be assumed that, living in fear of arrest and deportation, illegal aliens would have revealed their illegal status to a stranger such as Athanasiou. On the contrary,

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[3] There is no contention that the magistrate was provided with any information other than that contained in the affidavit.

one would expect this subject to rank high on the list of topics too sensitive to be casually revealed. The unlikelihood that the information was directly revealed by any of the aliens to Athanasiou is heightened by the fact that in depositions taken later in the present proceeding the deposition of Athanasiou was taken in the Greek language whereas the depositions of six out of seven of the seized aliens were taken in the Spanish language, indicating that any communication between him and them would have been handicapped by a language barrier.

Rather than hearing any such admissions by the aliens, Athanasiou may simply have concluded that his co-workers were illegal aliens by observing their physical appearance, language characteristics and the fact that they lived in cramped quarters on the premises where they worked. Such observations would be an insufficient basis, however, for determining that the person observed is an illegal alien, since there is no necessary connection between a person's physical, linguistic characteristics, and living arrangements, on the one hand, and the legality of his status, on the other. See *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 885-87 (1975);[4] *United States*

[4] The Supreme Court did indicate in *United States* v. *Brignoni-Ponce, supra*, that a person's apparent foreign ancestry, when considered along with suspicious behavior, might provide a "suspicion" of illegal status sufficient to allow him to be briefly questioned about his citizenship. See 422 U.S. at 885-87. Assuming *arguendo* that such a "suspicion" might have been raised in this case, this would still not be sufficient to uphold the search, since *Brignoni-Ponce* considered only

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v. *Mallides*, 473 F.2d 859, 860 (9th Cir. 1973). The fact that the co-workers were boarded in the basement is not inconsistent with traditional employers' past treatment of low-paid lawfully admitted immigrants. It is equally consistent to infer that, in tipping the INS that eight illegal aliens were employed on the premises, Athanasiou was simply passing along rumors about various employees which he had collected in the course of his employment at the restaurant; rumors, however, are patently insufficient to provide a sufficient basis for probable cause. If, indeed, Athanasiou obtained his information by direct statements from the aliens rather than by rumor, the Jacob affidavit should have so stated. Its failure to do so is a fatal deficiency.

To infer that the informant reached his conclusion in a reliable manner (e.g., through admissions by the aliens) rather than in an unreliable manner (e.g., through rumor or assumptions based on observations of physical appearance and the like) would be to permit a warrant to issue on the basis of a degree of speculation proscribed by the *Aguilar-Spinelli* test. While an affidavit supporting a search warrant should not be read in a grudging or technical manner, *United States* v. *Ventresca*, 380 U.S. 102, 108-09 (1965), neither should it require the magistrate, or a reviewing court, to use imagination to supply essential details critical to determining probable

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what facts, admittedly falling short of probable cause, would justify less than a full search or arrest by INS agents. See *id.* at 881-83. Cf. *Terry* v. *Ohio*, 392 U.S. 1 (1968).

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cause. See *Aguilar* v. *Texas*, *supra*, 378 U.S. at 114-15; *Giordenello* v. *United States*, 357 U.S. 480, 486 (1958). The affidavit in the present case requires precisely that. We do not mean to imply that in all cases an affidavit must detail precisely how the informant reached his conclusion, but "[i]n the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." *Spinelli* v. *United States*, *supra*, 393 U.S. at 416. The present affidavit completely lacks such supporting detail. The alleged illegal aliens are never named or even described. It furnishes no indication of their nationality, of how they came into the country, or indeed any statement about them other than their number and the conclusion about their illegality.

Our recent decision in *United States* v. *Pond*, 523 F.2d 210 (2d Cir. 1975), on which the government relies, does not suggest that such an undetailed affidavit would be sufficient. In *Pond*, the affidavit specifically described the baggage which allegedly contained marijuana, and averred that an informant, experienced in smelling marijuana, had detected marijuana fumes coming from the luggage in question. *Id.* at 211-13. The *Pond* affidavit thus made clear what is in the present case still an object of

conjecture: the manner in which the informant reached his conclusion about illegal activity.

The affidavit's statement that during the past five years 11 illegal aliens had been arrested at the restaurant does not remedy its failure to set forth how the informant obtained his information. To be sure, Chief Justice Burger's opinion in *United States* v. *Harris*, 403 U.S. 573 (1971), relied on a constable's knowledge of a person's reputation as a moonshiner and on a prior seizure of non-taxpaid whiskey at the person's house to help establish probable cause to search for illegal liquor. However, in *Harris* there was no doubt that the affidavit met the first prong of the *Aguilar-Spinelli* test—the requirement that the affidavit show how the informant secured his information; it recited that the informant had personally purchased non-taxpaid whiskey and had observed others doing so. The prior history of criminal activity in *Harris* was held sufficient, when considered along with other evidence, to allow the affidavit to pass the second prong of the *Aguilar-Spinelli* test: the requirement that the credibility of the informant be established, or, put another way, that the affidavit must give the magistrate a "substantial basis for crediting the hearsay" account by the informant of how he obtained the information. See 403 U.S. at 579-80. In our view, the *Harris* opinion does not suggest that when an affidavit clearly fails to pass the first prong of the test, the addition of a recital of past criminal activity may serve as an acceptable substitute for probable cause stand-

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ards that have not been met. Cf. *United States* v. *McNally*, 473 F.2d 934, 938-39 (3d Cir. 1973) (holding that *Harris* did not overrule two-pronged test).[5] If such a recital were sufficient to remedy the deficiency, any tip, no matter how unreliably obtained, would suffice to allow a search, provided it could be shown that the owner of the premises had a record of prior similar criminal offenses. While past involvement in criminal activity carries some weight, it will not supplant the necessity of showing how the informant obtained his information. We thus hold that the affidavit fails to state facts sufficient to indicate probable cause to search, and that the search warrant was therefore improperly issued.[6]

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[5] The *McNally* court ultimately upheld the search involved in that case despite defects in the affidavit on the ground that independent police investigation had provided evidence of suspicious conduct sufficient, when considered along with the informant's tip, to provide probable cause. See 473 F.2d at 939-40. There is no comparable evidence resulting from investigation by the INS agents in this case.

[6] Our decision that the Jacobs affidavit is insufficient for failure to state the source of the informant's information and the circumstances forming the basis for its statement that the aliens were "illegal" makes it unnecessary to determine whether, assuming the aliens were deportable, there was probable cause to support the affiant's statement that they had violated 8 U.S.C. § 1325, which makes it a crime to enter the United States illegally. However, in the absence of any facts or circumstances regarding the manner of the aliens' entry, the mere assertion that the aliens are "illegal" would not be sufficient to support an inference of violation of § 1325, since the aliens may well have become deportable because of conduct prior to or after a lawful entry, such as an overstay of allotted time as visitors or crewmen, see 8 U.S.C. § 1101(a)

Upon this appeal the government seeks for the first time to avoid the sanction which would normally follow as a matter of course from our holding that the warrant was issued without probable cause, i.e., the exclusion of the evidence obtained as a result of the search from the trial of the appellees. We are asked to modify the exclusionary rule so as to make it inapplicable whenever law enforcement agents have followed the preferred course of going to a magistrate to obtain a search warrant, even though the warrant turns out to have been improperly issued. The basic contention, which was not made before Judge Watson, in that in such a case the rule does not serve to deter unconstitutional searches because the unconstitutionality of the search is due only to a mistake in judgment on the part of the magistrate, and not to any bad faith on the part of the officers. There the rule does not serve any deterrent function, the argument continues, its use should be avoided since it then serves only to exclude probative evidence.

In response appellees challenge the good faith of the INS agents who obtained the warrant in the present case, contending that material representations in the Jacobs affidavit were false and that two

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(15) (B), the failure to maintain a lawful status as students or transits after lawful entry, or the existence of some other ground unconnected with illegal entry, see 8 U.S.C. § 1251 (a). The informant himself, for instance, although described as an "illegal alien" in the Jacobs affidavit had entered the United States lawfully as a visitor and overstayed his allotted time, which is not a violation of § 1325. Similarly the "illegal" alien referred to in Count Seven, Lam Mang Fuk, entered lawfully.

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warrantless searches simultaneously made by the agents of the home of John Karathanos and of a nearby resident indicate that the agents were engaged in a general dragnet operation. Since an issue was thus raised as to whether the magistrate was misled, it is argued that the government should at this stage be precluded from assuming that the agents acted in good faith. If the agents' good faith should turn out to be material, appellees argue that they are at least entitled to an evidentiary hearing on the issue. See *United States* v. *Dunnings*, 425 F.2d 836, 840 (2d Cir. 1969), *cert. denied*, 397 U.S. 1002 (1970).

Were we considering the advisability of adopting an exclusionary rule prior to definitive landmark Supreme Court decisions on the subject, the government's thesis would provide an intriguing suggestion for possible formulation of a somewhat different version of the rule. See Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970); Amsterdam, *Search, Seizure and Section 2255: A Comment*, 112 U. Pa. L. Rev. 378 (1964). But see Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 476 n. 598 (1974). However, no purpose is served by pursuing the government's suggestion, since decisions of the Supreme Court outlining the scope of the exclusionary rule offer no support for limiting it in this manner. The landmark discussions of the rule clearly regard it as a remedy to be applied whenever the search in question does not comply with Fourth

Amendment standards, regardless of the presence or absence of a warrant and the good or bad faith of the police officers. See *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Weeks* v. *United States*, 232 U.S. 383 (1914). The Supreme Court has specifically ordered the exclusion of evidence even when the unconstitutionality of the search resulted only from what might be termed a magistrate's error of judgment in determining probable cause. See *Aguilar* v. *Texas*, *supra*; *Giordenello* v. *United States*, *supra*; *Byars* v. *United States*, 273 U.S. 28 (1927). In the face of such an unvarying application of the rule by the Supreme Court, even if we were convinced that the rule should be modified as suggested by the government, it would be inappropriate for this court to do so since, as we said in *Salerno* v. *American League of Professional Baseball Clubs*, 429 F.2d 1003, 1005 (2d Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971), with rare exceptions not here applicable, "we continue to believe that the Supreme Court should retain the exclusive privilege of overruling its own decisions. . . ."

Moreover, we are unpersuaded by the arguments of policy underlying the government's position. Given the fragmentary empirical evidence regarding the actual effectiveness of the exclusionary rule in deterring unconstitutional searches,[7] any discussion of

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[7] An extensive recent study of the effects of the exclusionary rule concludes that the study's findings "represent the largest fund of information yet assembled on the effect of the exclusionary rule, but they obviously fall short of an empirical sub-

its deterrent effects must be undertaken with considerable humility. However, there is no reason to assume that the rule does not help to deter unconstitutional searches even when applied in cases such as the present one, where the evidence was seized pursuant to a warrant issued without probable cause. While we do not assume that United States magistrates or state officials authorized to issue search warrants are necessarily prone to act as the "rubber stamp[s] for the police" condemned in *Aguilar* v. *Texas*, *supra*, 378 U.S. at 111, the exclusionary rule's effect of making them aware that their decision to issue a search warrant is a matter of importance not only in regard to the constitutional rights of the person to be searched, but also in regard to the success of any subsequent criminal prosecution, may well induce them to give search warrant applications the scrutiny which a proper regard for the Fourth Amendment requires, see *id.*

The suggested modification of the exclusionary rule might also have a significant, albeit indirect, effect on the behavior of police officers. If a magis-

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stantiation or refutation of the deterrent effect of the exclusionary rule." Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 709 (1970). While Professor Oaks does suggest that the rule be abandoned when an effective tort remedy against police for illegal searches is available, he characterizes this position as a "polemic" not based on the available empirical evidence. See *id.* at 754-57. For a collection of, and brief criticisms of, some of the other empirical studies of the rule, see Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 475 n.593 (1974).

trate's issuance of a warrant were to be, as the government would have it, an all but conclusive determination of the validity of the search and of the admissibility of the evidence seized thereby, police officers might have a substantial incentive to submit their warrant applications to the least demanding magistrates, since once the warrant was issued, it would be exceedingly difficult later to exclude any evidence seized in the resulting search even if the warrant was issued without probable cause. The suggestion that "magistrate-shopping" or patronization by the police of lenient or "rubber stamp" justices of the peace could be remedied by removal of the offenders ignores the fact that many state officials entitled to issue search warrants are elected to office.[8] For practical purposes, therefore, the standard of probable cause might be diluted to that required by the least demanding official authorized to issue warrants, even if this fell well below what the Fourth Amendment required. By contrast, the present universal application of the exclusionary rule to all unconstitutional searches gives law enforcement officers no comparable incentive to seek out the most lenient magistrates. In sum, while any appraisal of

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[8] To take but one example, county court judges in New York State are authorized to issue search warrants. See N.Y. Crim. Proc. L. §§ 10.10, 690.05. Under the state constitution, these judges are elected for 10-year terms, N.Y. Const. art. 6, § 10, and are removable for cause only after full hearings by the court on the judiciary, or upon the recommendation of the governor by a two-thirds vote of the state senate. Id., art. 6, §§ 22, 23b.

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the effectiveness of the exclusionary rule cannot claim to be conclusive, we cannot accept the view that the rule patently lacks any deterrent function in cases such as the present one.[9]

The final contention advanced by the government is that the exclusionary rule should be applied here only to bar introduction of the evidence obtained during the search—primarily the INS agents' testimony about the presence of the illegal aliens on the premises—but not to exclude the testimony of the arrested aliens about their relationships with the Karathanos brothers. It is urged that the combination of circumstances in this case—the INS agents' obtaining of a warrant and the aliens' decision voluntarily to testify against the Karathanos brothers—is sufficient to break the connection between the original illegal search and the testimony. We must, of course, appraise this question under the principles set out in *Wong Sun* v. *United States*, 371 U.S. 471, 487-88 (1963):

> "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not

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[9] *Michigan* v. *Tucker*, 417 U.S. 433 (1974), does not indicate that the Supreme Court is about to undertake a sweeping reformation of the Fourth Amendment exclusionary rule. The Court's conclusion that no purpose would be served by applying the Fifth Amendment exclusionary rule in the circumstances of *Tucker* was grounded in the fact that the police officers had there fully complied with the constitutional standards in effect at the time of the arrest. See 417 U.S. at 443-46. Here, by contrast, the appellees' Fourth Amendment rights were clearly violated by the search.

> have come to light but for the illegal actions of the police. Rather, the more apt question is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt 221 (1959)."

Mapping all the distinctions between such "fruits of the poisonous tree" and a healthy harvest fit for court consumption is a task which has recently led even one distinguished commentator to throw up his hands in despair, see Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 361 (1974). However, our previous decision in *United States* v. *Tane*, 329 F.2d 848 (2d Cir. 1964), provides some guidance. In *Tane*, where a witness had agreed to testify after his identity had been discovered by an illegal wiretap and he had been confronted with transcripts of the wiretapped conversations, we rejected the argument that his decision to testify was a sufficient intervening act to allow the testimony to be used at trial, and held that the testimony must be excluded because "[t]he road from the tap to the testimony may be long, but it is straight." 329 F.2d at 853. From *Tane*, it is clear that the fact that a living witness, rather than inanimate evidence, is derived from an illegal search does not necessarily render the witness' testimony admissible at trial. See also *United States* v. *Garcilaso de la Vega*, 489 F.2d 761, 763 (2d Cir. 1974).

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The government seeks to distinguish *Tane* on the ground that *Tane* involved a deliberate violation of Fourth Amendment rights, while here the INS agents acted in good faith by obtaining a search warrant. Our opinion, however, did not rest on the nature of the police officers' conduct, but rather on the closeness of the connection between the original illegality and the witness' testimony. See 329 F.2d at 853. Moreover, while the "purpose and flagrancy of the official misconduct" are indeed relevant considerations in determining how far the taint of the original illegality extends, *Brown* v. *Illinois*, 422 U.S. 590, 603-04 (1975); see *United States* v. *Edmons*, 432 F.2d 577, 584-85 (2d Cir. 1970), the fact that the agents obtained a warrant is far from conclusive in resolving the admissibility of the aliens' testimony since, for reasons already stated, the exclusionary rule still performs a significant, function in such a case. Indeed, *Brown* v. *Illinois* itself, in holding that the giving of *Miranda* warnings to an illegally arrested person did not, by itself, suffice to make a confession admissible, warned against adopting any such "talismatic test[s]" to resolve the question of the scope of the taint of an illegal search. 422 U.S. at 603.

In the present case, there is a close connection between the initial illegal search and the testimony which the government seeks to use at trial. The purpose of the search, as described in the application for the warrant, was to seize the illegal aliens; it is these same aliens who are now the government's prospective witnesses. Once the aliens were arrested, the INS

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agents had obtained considerable leverage over them, since it was within the government's discretion to prosecute and deport them, or to allow them to leave the United States voluntarily. See 8 U.S.C. § 1252(b). If deported, the aliens would be permanently ineligible to receive visas to re-enter the country, see 8 U.S.C. § 1182(a)(17), while voluntary departure at one's own expense carries no similar penalty of permanent exclusion. The government concedes that the aliens' testimony was prompted by the use of this leverage; their agreement to testify came only after a promise to allow them to voluntarily depart without prosecution. In these circumstances, we think their decisions to testify cannot accurately be characterized as intervening "act[s] of free will" of sufficient independence "to purge the primary taint of the unlawful invasion." *Wong Sun* v. *United States*, *supra*, 371 U.S. at 486. The testimony is the not unpredictable result of the influence which the government possessed over the aliens once they had been arrested during the initial illegal search, and if such reasonably foreseeable fruits of the search were deemed admissible, it might help induce similar future searches without probable cause in the hope that they would uncover aliens who could be similarly prompted to testify.

Accordingly, we affirm the decision below and remand the case for further proceedings consistent with this opinion.

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VAN GRAAFEILAND, *Circuit Judge*, dissenting:

The search warrant in this case was issued by a United States magistrate sitting in the Eastern District of New York, who, before he assumed office, took the same oath to administer justice as did the judges of this Court. 28 U.S.C. §§ 631(f) and 453. The proper role for a reviewing court is to show deference to a determination of probable cause made by such a magistrate, *United States* v. *Rahn*, 511 F.2d 290, 292 (10th Cir.), *cert denied*, 44 U.S.L.W. 3201 (October 7, 1975); *United States* v. *DePugh*, 452 F.2d 915, 921 (10th Cir. 1971), *cert. denied*, 407 U.S. 920 (1972), with any doubt being resolved in favor of upholding the search warrant he issued. *United States v. Ventresca*, 380 U.S. 102, 106 (1965); *Iveson* v. *North Dakota*, 480 F.2d 414 (8th Cir. 1973), *cert. denied*, 414 U.S. 1044 (1974); *Griffin* v. *Hudson*, 475 F.2d 814, 815 (6th Cir. 1973).

We have held that in close cases the very fact that a magistrate found probable cause is itself a substantial factor tending to uphold the validity of a warrant. *United States* v. *Ramirez*, 279 F.2d 712, 716 (2d Cir.), *cert. denied*, 364 U.S. 850 (1960); *United States* v. *Freeman*, 358 F.2d 459, 462 (2d Cir.), *cert. denied*, 385 U.S. 882 (1966). We have also said that "one of the best ways to foster increased use of warrants is to give law enforcement officials the assurance that when a warrant is obtained in a close case, its validity will be upheld." *United States* v. *Lewis*, 392 F.2d 377, 379 (2d Cir.), *cert. denied*, 393 U.S. 891 (1968). In *United States*

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v. *Desist*, 384 F.2d 889, 897 (2d Cir. 1967), *aff'd*, 394 U.S. 244 (1969), we said that warrants issued by an independent magistrate will be examined less rigorously than searches without a warrant. Instead of following this oft-stated and salutary rule, the majority has, I fear, examined the warrant and supporting affidavit herein with the same "microscopic intensity" they would use if it were a municipal bond, *United States* v. *Pond*, 523 F.2d 210, 214 (2d Cir. 1975), or a trust indenture, *United States* v. *Desist*, *supra*, 384 F.2d at 897.

There is no magic formula which a magistrate follows in determining whether there is probable cause for the issuance of a search warrant, and precedent is of little value. The existence of probable cause depends on the facts and circumstances of each particular case, and decided cases are helpful only in declaring the general rule. *United States* v. *Ramirez*, *supra*, 279 F.2d at 714. The affidavit which is submitted to the magistrate is usually drafted by a non-lawyer in the course of a rapidly moving criminal investigation and should be tested in a commonsense and realistic fashion. *United States* v. *Ventresca*, *supra*, 380 U.S. at 108; *United States* v. *Lewis*, *supra*, 392 F.2d at 379; *United States* v. *Manfredi*, 488 F.2d 588, 599 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); *United States* v. *Wong*, 470 F.2d 129, 131 (9th Cir. 1972); *Iveson* v. *North Dakota*, *supra*, 480 F.2d at 418. A hypertechnical reading should be avoided. *United States* v. *Spach*, 518 F.2d 866, 872 (7th Cir. 1975); *United States* v. *Holiday*, 474 F.2d 320, 321

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(10th Cir. 1973). Reasonable inferences from the facts stated are not precluded. *United States* v. *Pond*, *supra*, 523 F.2d at 213. Finally, and most importantly, the magistrate need not be convinced of the existence of the evidence sought to be uncovered by the search. It is sufficient if there is a substantial basis for him to conclude that it exists. *United States* v. *Burke*, 517 F.2d 377, 381 (2d Cir. 1975).

Using the above criteria as our guide, let us now put ourselves in the position of the magistrate in the instant case and decide whether we, as prudent persons, would believe that an offense was being committed on defendants' premises. *McCray* v. *Illinois*, 386 U.S. 300, 304 (1967). Would the flags fly and the rockets go off when we read that Mr. Athanasiou, an illegal alien, had been living for one and one-half years with eleven other persons in "six (6) foot by six (6) foot cubicles" in the basement of defendants' restaurant? Or, would we simply "ho-hum" this information by saying, as does the majority, that this "is not inconsistent with *traditional* employers' *past* treatment of low-paid lawfully admitted immigrants"? (Emphasis supplied).

Would we recognize that the information supplied by Mr. Athanasiou is "*toto coelo* removed from a 'meager report' that 'could easily have been obtained from an offhand remark heard at a neighborhood bar', as to which prior history of providing accurate information is required, *Spinelli* v. *United States*, 393 U.S. 410, 417 (1969)"? *United States* v. *Burke*, *supra*, 517 F.2d at 381; *United States* v. *Rollins*, 522 F.2d

160, 164 (2d Cir. 1975). Would we be appreciative of the fact that Mr. Athanasiou was not an unknown informant passing on idle rumor or irresponsible conjecture but was, himself, a confessed participant in and victim of a crime allegedly taking place on defendants' premises? *United States* v. *Burke, supra*, 517 F.2d at 380; *United States* v. *Miley*, 513 F.2d 1191, 1204 (2d Cir. 1975). Would we agree that an admission against penal interest is a "significant, and sometimes conclusive, reason for crediting the statements of an informant"? *Armour* v. *Salisbury*, 492 F.2d 1032, 1035 (6th Cir. 1974); *United States* v. *Mahler*, 442 F.2d 1172, 1175 (9th Cir.), *cert. denied*, 404 U.S. 993 (1971); *Agnellino* v. *State of New Jersey*, 493 F.2d 714, 726 (3d Cir. 1974).

Would we ignore the fact that, during the past five years, at least eleven named illegal aliens had been apprehended on defendants' premises? Would we consider it unusual that Mr. Athanasiou, himself an illegal alien residing in defendants' basement, "knew" that six other people with whom he had resided in that basement for one and one-half years were also illegal aliens? Would we consider Mr. Athanasiou, illegally living in defendants' basement, a "stranger" to the other illegal aliens with whom he resided in such close quarters for eighteen months, so that none of them would reveal their similar illegal status? Would we completely ignore the commonly accepted truism that "birds of a feather flock together"?

If we answer all these questions as does the majority we would not issue the warrant. However, if we do not, and if we recognize that "only a probability of criminal activity is necessary for there to be probable cause", *United States* v. *Gimelstob*, 475 F.2d 157, 160 (3d Cir.), *cert. denied*, 414 U.S. 828 (1973), we would issue it, and properly so. The fact that I am dissenting indicates what my own answers would be.

The Nature of the Sanction

My brothers correctly hold that the privilege of overruling Supreme Court decisions should ordinarily remain with that court. However, having professed our adherence to this rule, we are duty bound to see that our pronouncements concur with those of the majority of the members of that court. Moreover, we need not wait for the proverbial "brown cow" case to be decided before moving in the same direction as that majority.

In *United States* v. *Calandra*, 414 U.S. 338, 348 (1974), Mr. Justice Powell, speaking for the majority, said of the exclusionary rule:

> In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.

This Court said substantially the same thing in *United States* v. *Burke*, *supra*, 517 F.2d at 386 n.12:

> In contrast to cases involving confessions or identification, where exclusion not only may tend

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> to enforce decent police practices but may prevent the introduction of unreliable evidence, exclusion in Fourth Amendment cases generally can serve only the former function.

We have recognized that there is a growing disenchantment with the exclusionary rule, *United States* v. *Artieri*, 491 F.2d 440, 446 (2d Cir.), *cert. denied*, 417 U.S. 949 (1974), and such disenchantment is particularly apparent when it is applied in cases such as this. We have stated that the rule is a "blunt instrument, conferring an altogether disproportionate reward, not so much in the interest of the defendant as in that of society at large." *United States* v. *Dunnings*, 425 F.2d 836, 840 (2d Cir. 1969), *cert. denied*, 397 U.S. 1002 (1970). Should we not, then, look at the latest decisions of the Supreme Court to see whether it is moving away from the harshness of this rule?

In *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974) Mr. Justice Rehnquist, speaking for the court, said:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

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This language is peculiarly apposite to the situation with which we are dealing and is, I think, a signpost indicating the direction in which we should be traveling. The statement of the majority that "there is no reason to assume that the [exclusionary] rule does not help to deter unconstitutional searches" is a rather weak argument against so doing.

The court in *Tucker* also stated at 448:

> Whatever deterrent effect on future police conduct the exclusion of those statements may have had, we do not believe it would be significantly augmented by excluding the testimony of the witness Henderson as well.

and at page 451:

> To extend the excision further under the circumstances of this case and exclude relevant testimony of a third-party witness would require far more persuasive arguments than those advanced by respondent.

Mr. Justice White, in concurring, said at page 461:

> *Miranda* having been applied in this Court only to the exclusion of the defendant's own statements, I would not extend its prophylactic scope to bar the testimony of third persons even though they have been identified by means of admissions that are themselves inadmissible under *Miranda*. The arguable benefits from excluding such testimony by way of possibly deterring police conduct that might compel admissions are, in my view, far outweighed by the advantages of having relevant and probative testimony, not obtained by actual coercion, available at criminal trials to aid in the pursuit of truth.

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If we are not yet prepared to follow in the direction in which *Tucker* indicates the Supreme Court is traveling, we should not resolutely set our faces in the opposite direction. I respectfully dissent from the opinion of my brothers which appear to me to do exactly that.[1]

OAKES, *Circuit Judge* (concurring):

I agree with everything that Judge Mansfield has said in his opinion and join therein. I would add only that, as Professor Amsterdam has so aptly pointed out, criticism of the exclusionary rule has been directed, as was the Government's argument in this case, at the rule as if it were a means to "deter" specific episodes of past unconstitutional police behavior. In fact, the exclusionary rule should be looked at as the principal means for ensuring governmental performance of the obligations im-

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[1] Were I not dissenting, I would nonetheless disassociate myself from the majority's remarks concerning "magistrate-shopping", "patronization by the police of lenient or rubber-stamp justices of the peace" or "least demanding" or "most lenient" magistrates. The majority's implication that justices of the peace and other elected state officials who are entitled to issue search warrants are not honorable and dedicated men does them a grave disservice. Moreover, the majority's willingness not to assume that United States magistrates are "necessarily prone" to act as rubber stamps is damning with exceedingly faint praise. The concept of unscrupulous police and amenable magistrates being thwarted in their conspiratorial aims only by our vigilance has little basis in actual fact and certainly none in this case.

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posed by the Fourth Amendment upon the system of criminal justice as a whole. *See* Amsterdam, *Perspective on the Fourth Amendment*, 58 U. Minn. L. Rev. 349, 432 (1974). The misdirected criticism of the exclusionary rule stems from an unduly narrow view of the Fourth Amendment which conceives of it as a collection of protections of individual spheres of interest, rather than as a broad regulatory canon of Government pertaining to law enforcement procedures which keeps us all secure against the conduct it condemns. *See* Amsterdam, *supra*, 58 U. Minn. L. Rev. at 367; *United States* v. *Barbera*, 514 F.2d 294, 299 n.12 (2d Cir. 1975).

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APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

75-1322

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of February one thousand nine hundred and seventy-six.

Present:

HON. WALTER R. MANSFIELD
HON. JAMES L. OAKES
HON. ELLSWORTH VAN GRAAFEILAND
Circuit Judges

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

STEVE KARATHANOS AND JOHN KARATHANOS, DEFENDANTS-APPELLEES

Appeal from the United States District Court for the Eastern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

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ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed and that the action be and it hereby is remanded to said District Court for further proceedings consistent with the opinion of this court.

A. DANIEL FUSARO
Clerk

by Vincent A. Carlin
Chief Deputy Clerk

APPENDIX C

UNITED STATES OF AMERICA

v.

STEVE KARATHANOS AND JOHN KARATHANOS,
DEFENDANTS

No. 75 CR 456

United States District Court, E.D. New York

Aug. 1, 1975

MEMORANDUM AND ORDER

WATSON, District Judge.

Defendants are charged with concealing, harboring or shielding from detection aliens not lawfully entitled to enter or reside within the United States in violation of 8 U.S.C. § 1324.

Pursuant to Rule 41(f) of the Federal Rules of Criminal Procedure they move to suppress the evidence obtained as a result of a search of the premises of Steve's Pier I Restaurant (hereafter referred to as the premises), a search conducted by agents of the Immigration and Naturalization Service pursuant to a warrant issued by the federal magistrate on May 16, 1975. The search resulted in the arrest of seven individuals found on the premises. It is the suppression of evidence of their presence in the restaurant and any testimony which they might give as a result of their arrest which is the object of defendants' motion.

Defendants argue that the issuance of the search warrant was not supported by probable cause that a federal crime had been or was being committed. Specifically, they contend the affidavit of an investigator of the Immigration and Naturalization Service (The Jacobs Affidavit), did not provide the magistrate with sufficient basis to believe that a crime had probably been committed.

The text of the Jacobs affidavit reads as follows:

> NEIL JACOBS, being duly sworn, deposes and says that he is a criminal investigator, employed by the Immigration and Naturalization Service of the Department of Justice, duly appointed according to law and acting as such.
>
> Upon information and belief, there are a number of aliens who are not lawfully entitled to enter or reside within the United States, employed at and present within the premises known and operated as STEVE'S PIER I RESTAURANT, 33 BAYVILLE AVENUE, BAYVILLE, NEW YORK, within the Eastern District of New York. The presence of said aliens is a violation of Title 8, United States Code, Section 1325. Moreover, such aliens are subject to arrest pursuant to Title 8, United States Code, Section 1325, for having unlawfully entered the United States.
>
> The source of your deponent's information and the grounds for his belief are:
>
> 1. During the past five years at least eleven aliens have been apprehended on the premises known as STEVE'S PIER I RESTAURANT, 33 BAYVILLE AVENUE, BAYVILLE, NEW

YORK, including but not limited to the following individuals: MICHAEL KATSIGIORGIS, DIMITRIOUS STROUPAS, EMANUEL ARETINES, VELIRIS KOSTAS, VICTOR LLANOS, KOASTANTINOS VOULGARIDIS, ROBERTO BARRENCHEA-CAMACHO, VICTOR ALEXANDRO LLANOS-ATUNEA, LADIGLAO VENEGAS-FLORES, HUGO LAGOS, and NICKOLOS TISSANOS.

2. On May 15, 1975, one ANTHANASIOS ATHANASIOU, an admitted illegal alien, holding Greek citizenship, surrendered himself to agents of the Immigration and Naturalization Service at 20 West Broadway, New York, New York. After being advised of his rights, Mr. Athanasiou advised that he had been employed at STEVE'S PIER I RESTAURANT, 33 BAYVILLE AVENUE, BAYVILLE, NEW YORK, from October of 1973 till Sunday, May 11, 1975; that as of May 11, 1975 at least eight other persons known to him to be illegal aliens were employed at STEVE'S PIER I RESTAURANT, 33 BAYVILLE AVENUE, BAYVILLE, NEW YORK. That during the last year and a half he has resided in the basement of said restaurant with eleven other individuals in six (6) foot by six (6) foot cubicles. That at least six of the eleven individuals residing in the basement at 33 Bayville Avenue, Bayville, New York are known to him to be illegal aliens.

WHEREFORE, your deponent respectfully requests that a warrant issue to your deponent or any other criminal investigator employed by the Immigration and Naturalization Service of the Department of Justice, authorizing him or

them to enter with proper assistance the premises known as STEVE'S PIER I RESTAURANT, 33 BAYVILLE AVENUE, BAYVILLE, NEW YORK and there to search for the above described aliens.

It is my opinion the information supplied in this affidavit is less than that which could provide a substantial basis to believe that "illegal" aliens were probably to be found on the premises proposed to be searched. Without a substantial basis to believe the object of the search will probably be found on the premises proposed to be searched, the search warrant should not issue. *Jones* v. *U.S.*, 362 U.S. 257, 271, 80 S.Ct. 725, 4 L.Ed. 697 (1960).

There has been an initial dispute as to precisely what crime or "illegality" the Jacobs affidavit had to indicate. Defendants have argued that probable cause had to exist to believe a violation of 8 U.S.C. § 1325 had occurred. Such a violation would be limited to entering the United States at a place other than a designated entry point or by eluding immigration inspection or by obtaining entry by making false representation. The government argues that probable cause to believe that *any* "illegality" existed in an alien's status would justify the issuance of a search warrant. Such an "illegality" might arise from staying on beyond the term of a legal visa such as would be held by a tourist or student. The government bases its position either on the tenuous theory that any "illegality" in an alien's status gives reason to believe a violation of 8 U.S.C. § 1325 has oc-

curred or on the powers given to agents of the Immigration and Naturalization Service in 8 U.S.C. §§ 1357(a)(1) and 1357(a)(2) to interrogate or arrest aliens without a warrant.

Theoretically, probable cause to believe in the "illegal" status of aliens might be easier to develop than probable cause to believe in a violation of 8 U.S.C. § 1325 for the simple reason that § 1325 covers fewer fact situations, all related to the manner of entry. See, *United States* v. *Oscar*, 496 F.2d 492 (9th Cir. 1974). However the deficiencies of the Jacobs affidavit are such that it falls short of providing a substantial basis to believe that "illegal" aliens of *any kind* were on the premises let alone that they were violators of 8 U.S.C. § 1325. Consequently, I do not find it necessary to decide the serious question of whether anything other than the prospect of discovering violations of 8 U.S.C. § 1325 would justify the issuance of a search warrant.

I should note, however, that I reject any suggestion that the powers granted in 8 U.S.C. § 1357 in any way lessen the requirement that probable cause exist when a search warrant is sought in connection with a search for "illegal" aliens in the broader sense. I also reject any analogy between the situation herein and the type of administrative inspection searches which were found reasonable in *Camara* v. *Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). See, *Almeida-Sanchez* v. *U.S.*, 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973). See also, *United States* v. *Brignoni-*

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Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975).

Aside from the special circumstances existing at our borders with other countries and their functional equivalents, I find no support whatsoever for a standard of probable cause to search for "illegal" aliens less rigorous than that prevailing in searches relating to matters generally considered to be crimes. Accordingly, the Jacobs affidavit must be subjected to the same scrutiny it would undergo if it were to be submitted for the purpose of searching for evidence of crimes in such matters as narcotics, gambling, alcoholic beverages, firearms or stolen merchandise.

The Jacobs affidavit contains two rudimentary informative paragraphs; the first, a statement by the affiant that during the past five years at least eleven named "illegal" aliens were apprehended on the premises; the second, the hearsay information of a named admitted "illegal" alien, one Athanasiou, that he had worked and lived on the premises for a year and a half, that he knew eight fellow-employees to be illegal aliens and that he knew of six of his eleven fellow-residents to be "illegal" aliens.

The affidavit stands or falls on the hearsay information it contains. This information is the conclusory assertion of knowledge by Athanasiou, an "admitted illegal alien" that other persons employed and residing on the same premises as he, were "illegal aliens". This is not enough to provide a reasonable and prudent man with a substantial basis to believe

that aliens who had entered the United States in violation of 8 U.S.C. § 1325 were probably to be found on the premises, or for that matter, that "illegal" aliens of any kind were to be found there.

I am well aware that affidavits for search warrants should not be viewed in a grudging or negative manner nor should they be impeded by overtechnical requirements of elaborate specificity. *United States* v. *Ventresca*, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965). However, where the hearsay information is of such fundamental importance, its impact is vitiated by its bare conclusory form, the absense of any indication as to how the informant came to his incriminating conclusion and the lack of a specially strong showing of credibility or reliability. The simply fact that Athanasiou worked and lived on the premises is not enough to provide a substantial basis to believe what he says about the criminal or "illegal" status of others on the premises. This is particularly so when, as here, there is no logical connection between presence on the premises and the witnessing of conduct revealing entry into the United States in a manner which violates 8 U.S.C. § 1325 or any other illegality in the status of others who may be on the premises.

The government has attempted to bolster the hearsay information by making comparisons to selected elements of prior cases. The conclusory assertion that Athanasiou knows others to be "illegal" aliens is compared to the conclusory assertion in *United States* v. *Draper*, 358 U.S. 307, 79 S.Ct. 329, L.Ed.2d 327

(1959) that the defendant would be carrying narcotics. The reported admission by Athanasiou that he was an illegal alien is said to resemble the admission of major elements of an offense relating to the sale, purchase, or possession of unstamped liquor which was analyzed in *Harris* v. *United States*, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971). The absence of material related to Athanasiou's credibility and reliability is likened to the absence of reliability recitations in witness-informant affidavits such as that involved in *United States* v. *Burke*, Slip Op. No. 888, decided June 25, 1975.

I do not accept either the accuracy of these comparisons or the underlying assumption that if the present hearsay information simply has some resemblance to "approved" elements of past affidavits, it must be sufficient to establish probable cause.

The conclusory assertion by the informant in *United States* v. *Draper*, *supra*, that the defendant would be carrying narcotics was a deficient aspect of the information. The deficiency was remedied by a strong indication of the informant's prior reliability and an unusual precision in the informant's description of the circumstances surrounding the predicted criminal act. Neither of these remedial factors are present here.

Similarly, in *Jones* v. *United States*, *supra*, additional factors such as previous reliability, corroboration by other sources of information and the fact that defendant was "known by the police to be a user of narcotics" overcame the weakness of the

informant's statement that he had bought narcotics on the premises and his assertion that narcotics were secreted there. Taken together, these factors provided a substantial basis for the magistrate to conclude narcotics were probably on the premises. It is important to note the statement in Justice Frankfurter's opinion at page 271 of 362 U.S., at page 736 of 80 S.Ct. that "it might not have been enough" had the affiant simply been told by one who claimed to have bought narcotics there that defendant was selling narcotics in the apartment. I am even of the opinion the suggested deficient portion of the informant's statement in *Jones* was more incriminating and more creditable than what we have here.

In *United States* v. *Harris, supra*, the informant's statements against his own penal interest were closely related to the criminal activity on the premises which was the object of the search. Thus, the credibility which was generated was not simply a result of the informant having made *any* statement against penal interest but rather one which arose out of involvement in the sale and purchase of illicit liquor on the premises. The essence of the Chief Justice Burger's analysis was stated at page 584 of 403 U.S., at page 2082 of 91 S.Ct. as follows:

> Concededly admissions of crime do not always lend credibility to contemporaneous or later accusations of another. *But here the informant's admission that over a long period and currently he had been buying illicit liquor on certain premises, itself and without more, implicated that*

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property and furnished probable cause to search. [emphasis supplied]

Here, whatever the nature of the admission against interest, it did not arise out of conduct which involved others on the premises or implicated the premises beyond his own presence there. Consequently, Athanasiou's admission that he was an "illegal" alien standing alone, adds little if anything to his credibility and does nothing to remedy the crucial failing of the affidavit which is the complete absence of any facts underlying his incriminating conclusion.

The absence of other material relating to the informant's credibility or the reliability of his information remains a defect in this affidavit since the circumstances here are not similar to those in which additional credibility and reliability factors were found to be dispensable. In general, where the informant is a witness to criminal activity and his information contains observations underlying his conclusion, a deemphasis of material relating to general credibility or prior reliability is justifiable. Thus, in *United States* v. *Sultan*, 463 F.2d 1066 (2 Cir. 1972) probable cause to believe that assets of the bankrupt were being concealed on the premises proposed to be searched was supplied by the hearsay statement of the defendant's cousin who said that defendant told him the assets were being concealed on the premises. In *United States* v. *Burke*, 517 F.2d 377 (CA 2d, 1975) probable cause to believe an unregistered sawed-off shotgun was on the premises

proposed to be searched was based on hearsay information that the informant had seen the shotgun in the bedroom of defendant's apartment and defendant had told him the shotgun was stolen in a burglary. See, *United States* v. *Viggiano*, 433 F.2d 716 (CA 2d, 1970) cert. denied 401 U.S. 938, 91 S.Ct. 934, 28 L.Ed.2d 219 (1971); *United States* v. *Dziliak*, 441 F.2d 212 (CA 2d, 1971); *United States* v. *Bozza*, 365 F.2d 206 (CA 2d, 1966). See also, *United States* v. *Office No. 508 Ricou-Brewster Bldg.*, 119 F.Supp. 24 (W.D.La. 1954).

It is probably true that the exact dual requirement announced in *Aguilar* v. *Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) (that the affidavit show the credibility of the informant and the reliability of his information as well as the circumstances underlying his incrimination conclusion) cannot be inflexibly applied to first time witness-informants. However, if there is to be flexibility in such cases, it surely cannot be displayed by allowing raw incriminating conclusions in circumstances where it is not clear how those conclusions were reached. After all, how can one explain a deficiency or complete absence of witnessed facts underlying an incriminating conclusion from someone whose sole claim to our attention and credibility derives from being a witness?

I am unwilling to perpetuate a standard for probable cause which combines the weakest aspects of prior affidavits; the absence of underlying facts in information supplied by reliable informants and the

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absence of credibility and reliability material in information supplied by witness-informants. Such a standard would justify the issuance of search warrants on a basis which is closer to raw suspicion and arbitrariness than the reasonable probabilities and inferences our constitution and our consciences demand. See generally, *United States* v. *Draper*, 358 U.S. 314, 79 S.Ct. 329 (1958) (dissenting opinion of Justice Douglas).

Viewed in this light, the informant's statement and the Jacobs affidavit as a whole is not the substance of which probable cause is made. In my opinion it could not provide a prudent man with a substantial basis to believe "illegal" aliens were probably on the premises and the search warrant ought not to have been issued.

Based on the foregoing, it is

Ordered, that defendants' motion to suppress the evidence obtained as a result of the search and seizure conducted on the premises on May 18, 1975 be, and the same hereby is, granted.

APPENDIX D

8 U.S.C. 1324. Bringing in and harboring certain aliens; persons liable; authority to arrest

(a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means of transportation who—

* * * * *

(3) willfully or knowingly conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, in any place, including any building or any means of transportation

* * * * *

any alien, including an alien crewman, not duly admitted by an immigration officer or not lawfully entitled to enter or reside within the United States under the terms of this chapter or any other law relating to the immigration or expulsion of aliens, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding $2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs: *Provided, however,* That for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring.

* * * * *

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8 U.S.C. 1325. Entry of alien at improper time or place; misrepresentation and concealment of facts

Any alien who (1) enters the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offenses, be guilty of a misdemeanor and upon conviction thereof be punished by imprisonment for not more than six months, or by a fine of not more than $500, or by both, and for a subsequent commission of any such offenses shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not more than two years, or by a fine of not more than $1,000, or both.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Docket No.

Case No.

UNITED STATES OF AMERICA

vs.

PREMISES KNOWN AND DESCRIBED AS: STEVE'S PIER I RESTAURANT, 33 BAYVILLE AVENUE, BAYVILLE, NEW YORK, DEFENDANT

SEARCH WARRANT

ANY SPECIAL CRIMINAL INVESTIGATOR, EMPLOYED BY THE IMMIGRATION AND NATURALIZATION SERVICE OF THE DEPARTMENT OF JUSTICE Affidavit(s) having been made before me by NEIL JACOBS, employed by the Immigration and Naturalization Service of the Department of Justice, that he has reason to believe that on the premises known as

STEVE'S PIER I RESTAURANT
33 Bayville Avenue
Bayville, New York

in the Eastern District of New York, there are now being employed and there are now present, aliens who are not lawfully entitled to enter or reside in the United States in violation of Title 8, United States

Code, Section 1325, as more fully set forth in the annexed affidavit. And as I am satisfied that there is probable cause to believe that the aliens so described are being concealed on the person or premise above described and that grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s).

You are hereby commanded to search within a period of ..... (not to exceed 10 days) the person or place named for the aliens specified, serving this warrant and making the search in the daytime (6:00 a.m. to 10:00 p.m.) and if the property be found ..... as required by law.

Dated this 16th day of May, 1975

/s/ V. A. C.
VINCENT A. CATOGGIO
Judge (Federal or State Court of Record)
or Federal Magistrate

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APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

—against—

PREMISES KNOWN AND DESCRIBED AS: STEVE'S PIER I RESTAURANT, 33 BAYVILLE AVENUE, BAYVILLE, NEW YORK, DEFENDANT

AFFIDAVIT FOR A SEARCH WARRANT

(T. 8, U.S.C. § 1325)

EASTERN DISTRICT OF NEW YORK, ss:

NEIL JACOBS, being duly sworn, deposes and says that he is a criminal investigator, employed by the Immigration and Naturalization Service of the Department of Justice, duly appointed according to law and acting as such.

Upon information and belief, there are a number of aliens who are not lawfully entitled to enter or reside within the United States, employed at and present within the premises known and operated as STEVE'S PIER I RESTAURANT, 33 BAYVILLE AVENUE, BAYVILLE, NEW YORK, within the Eastern District of New York. The presence of said aliens is a violation of Title 8, United States Code, Section 1325. Moreover, such aliens are subject to arrest pursuant to Title 8, United States Code, Section 1325, for having unlawfully entered the United States.

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The source of your deponent's information and the grounds for his belief are:

1. During the past five years at least eleven illegal aliens have been apprehended on the premises known as STEVE'S PIER I RESTAURANT, 33 BAYVILLE AVENUE, BAYVILLE, NEW YORK, including but not limited to the following individuals: MICHAEL KATSIGIORGIS, DIMITRIOUS STROUPAS, EMANUEL ARETINES, VELIRIS KOSTAS, VICTOR LLANOS, KOASTANTINOS VOULGARIDIS, ROBERTO BARRENCHEA-CAMACHO, VICTOR ALEXANDRO LLANOS-ATUNEA, LADIGLAO VENEGAS-FLORES, HUGO LAGOS, and NIKOLOS TISSANOS.

2. On May 15, 1975, one ATHANASIOS ATHANASIOU, an admitted illegal alien, holding Greek citizenship, surrendered himself to agents of the Immigration and Naturalization Service at 20 West Broadway, New York, New York. After being advised of his rights, Mr. Athanasiou advised that he had been employed at STEVE'S PIER I RESTAURANT, 33 BAYVILLE AVENUE, BAYVILLE, NEW YORK from October of 1973 till Sunday, May 11, 1975; that as of May 11, 1975 at least eight other persons known to him to be illegal aliens were employed at STEVE'S PIER I RESTAURANT, 33 BAYVILLE AVENUE, BAYVILLE, NEW YORK. That during the last year and a half he has resided in the basement of said restaurant with eleven other individuals in six (6) foot by six (6) foot cubicles. That at least six of the eleven individuals residing

in the basement at 33 Bayville Avenue, Bayville, New York are known to him to be illegal aliens.

WHEREFORE, your deponent respectfully requests that a warrant issue to your deponent or any other criminal investigator employed by the Immigration and Naturalization Service of the Department of Justice, authorizing him or them to enter with proper assistance the premises known as STEVE'S PIER I RESTAURANT, 33 BAYVILLE AVENUE, BAYVILLE, NEW YORK and there to search for the above described aliens.

/s/ Neil Jacobs
NEIL JACOBS
Criminal Investigator

Sworn to before me this 16th day of May, 1975.

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In The

Supreme Court of the United States

October Term, 1975

No. 75-1402

UNITED STATES OF AMERICA,

Petitioner,

vs.

STEVE KARATHANOS and JOHN KARATHANOS,

Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Second Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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South River, N.J. (201) 257-6850 | New York, N.Y. (212) 563-2121 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (301) 762-7700

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In The

Supreme Court of the United States

October Term, 1975

No. 75-1402

UNITED STATES OF AMERICA,

Petitioner,

vs.

STEVE KARATHANOS and JOHN KARATHANOS,

Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Second Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. A), entered February 2, 1976, is not yet reported. The opinion of the District Court (Pet. App. C), entered August 1, 1975, is reported at 399 F. Supp. 185.

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QUESTIONS PRESENTED

1. Whether this is a proper case in which to consider whether "good faith" of the law enforcement agents should be a relevant factor in determining the reach of the Fourth Amendment exclusionary rule, inasmuch as the Government did not raise that issue and, in fact, resisted inquiry into its good faith at the District Court level.

2. Whether the exclusionary rule should be abandoned in search and seizure cases where the law enforcement agents, instead of conducting a warrantless search, obtain and search under a warrant not supported by probable cause.

STATEMENT

The respondents concur with and adopt the statement in the petition for writ of certiorari, with the following additions:

In the District Court the respondents moved to suppress, with the primary ground being that Agent Jacobs' affidavit was insufficient on its face to show probable cause. Additional grounds, felt also to warrant suppression independently, were put forth for consideration in the event the affidavit was found to be facially sufficient.[1] One such ground was that certain material representations in Agent Jacobs' affidavit, specifically as to the number of aliens previously arrested on the premises and as to the amount of time the informant Athanasiou had

1. The grounds were briefed and put forth for the most part in the affidavits of Steve and John Karathanos, which accompanied the motion to suppress and which are reproduced as Respondents' Appendix A and B, *infra*.

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worked and lived on the premises, were false (Resp. App. A and B, pp. 2a, 3a, 6a, 7a, *infra*).[2] A second ground was that the agents, once having obtained the warrant, engaged in an overly broad search of the restaurant by breaking into Steve Karathanos' office and searching through file cabinets and desk drawers (Resp. App. A, p. 3a, *infra*).[3] Another ground was that the agents treated the warrant as a virtual writ of assistance by simultaneously conducting warrantless searches of the home of respondent John Karathanos and the home of another nearby resident.[4] Also the respondents argued that the agents misled the magistrate in procuring the warrant by asserting in the supporting affidavit that they were seeking to arrest aliens for violation of 8 U.S.C. §1325, and by not revealing that the real purpose of the warrant was to obtain evidence to prosecute these respondents under 8 U.S.C. §1324.[5]

2. It was alleged that only one alien rather than eleven had been arrested on the premises, and that Athanasiou had worked and lived on the premises for only a fraction of the time alleged by Agent Jacobs. The Government now concedes at least that Agent Jacobs' affidavit was "evidently inaccurate" on this latter point (Pet., p. 12, n.8).

3. The search warrant (Pet. App. F, pp. 47a, 48a) only authorized the agents to search for and seize illegal aliens, and such are not normally hidden in file cabinets and desk drawers.

4. These warrantless searches were made only moments before the raid on the restaurant, which took place at about 6:00 a.m. on a Sunday morning (Resp. App. A and B, pp. 3a, 5a, 6a, *infra*).

5. 8 U.S.C. §1325, which makes it a crime for an alien to enter the United States illegally (Pet. App. D, p. 46a), was the only statute the magistrate was told was violated. The "harboring" statute, 8 U.S.C. §1324 (Pet. App. D, p. 45a), was never cited to the magistrate, perhaps for good reason. Had it been cited to the magistrate, and had he read it, he may well have made a different assessment of probable cause for he would have known that the employment of illegal aliens and the "usual and normal practices incident to employment," is not a crime.

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These alternate grounds for suppression were supported by an offer of proof, and the respondents requested an evidentiary hearing to determine whether, and to what extent, the agents had imposed on the magistrate. The Government, feeling these grounds to be irrelevant, opposed an evidentiary hearing, offered nothing in answer to the respondents' assertions, and argued only the issue of probable cause.

The District Judge granted the motion to suppress, holding that the information in the affidavit was "not enough to provide a reasonable and prudent man with a substantial basis to believe that aliens who had entered the United States in violation of 8 U.S.C. §1325 were probably to be found on the premises, or for that matter that 'illegal' aliens of any kind were to be found there" (Pet. App. C, pp. 38a, 39a). Having found the affidavit facially insufficient to show probable cause, there was no need to grant the respondents' request for an evidentiary hearing concerning the alternate grounds, and the Government, of course, never asked for an evidentiary hearing on any matter. In his decision the District Judge did not address the issue of the agents' "good faith" and its effect, if any, on the exclusionary rule, because the Government never raised that issue before him.[6]

In its appeal to the United States Court of Appeals for the Second Circuit, the Government argued the issue of probable cause and set forth for the first time its contention that the good

6. The Government is wrong when it represents that it put forth a good faith argument to the District Judge which he failed to address (Pet., p. 5, n.1). We have reproduced the pages of the Supplemental Transcript cited by the Government (Resp. App. C, pp. 8a, 9a, *infra*), and it is evident no such issue was argued.

faith of the agents, apparently evidenced by the fact that they acted under color of a warrant, should permit it to avoid the sanction of the exclusionary rule. The majority affirmed the District Court on the probable cause issue, noting that to hold otherwise "would be to permit a warrant to issue on the degree of speculation proscribed by the *Aguilar-Spinelli* test"[7] (Pet. App. A, p. 9a). In rejecting the Government's "good faith" argument, the majority observed that this Court's "landmark discussions of the [exclusionary] rule clearly regard it as a remedy to be applied whenever the search in question does not comply with Fourth Amendment standards, regardless of the presence or absence of a warrant and the good or bad faith of the police officers" (*id.* at 14a, 15a). Moreover, the majority reasoned that continued application of the exclusionary rule in cases such as this should serve a deterrent function by inducing magistrates "to give search warrant applications the scrutiny which a proper regard for the Fourth Amendment requires" (*id.* at 16a), and should serve to deter law enforcement agents from "submit[ting] their warrant applications to the least demanding magistrates" (*id.* at 17a).

The Government now abandons the probable cause issue and argues, that assuming the warrant to be constitutionally invalid, the exclusionary rule should not be applied as it serves no deterrent function because its agents acted in good faith.

REASONS FOR DENYING THE WRIT

We acknowledge the existence of considerable and lively debate among scholars concerning the exclusionary rule and its

7. *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1968).

effectiveness as a means of deterring unconstitutional police action. We recognize too that this Court has only recently heard argument in two cases[8] which raise a "good faith" issue not unlike the issue the Government seeks to frame here. As both cases come from State jurisdictions, it is not surprising to see the Federal Government in search of a vehicle to ride in on the debate. It may, in fact, be good to have the Federal Government in on the argument if this Court is seriously considering repudiating over sixty years' worth of constitutional doctrine. But whether this vehicle can take that trip is another question. We think not for several reasons, one of which is the Government's own approach to this case at the most critical stage of the litigation, when before the District Judge. That approach, put quite simply, is that it refused to discuss the faith of its agents, good or bad, because in its view any such issue was irrelevant. And that approach, we think, precludes the Government from framing the issue it seeks to frame here in anything but a hypothetical sense.

1. Had this been a case involving nothing more than the issue of probable cause, with the agents' behavior being otherwise innocuous, then arguably it could be postured for the Government's good faith-exclusionary rule issue. But this is not the case. As we have indicated in the Statement, *supra*, there were matters raised before the District Judge quite apart from the facial sufficiency of the supporting affidavit. These matters included possible false statements in the supporting affidavit, abuse of the warrant by the overly broad search and by the simultaneous warrantless searches, and an apparent deception upon the magistrate as to what crime the

8. *Wolff v. Rice*, 74-1222 and *Stone v. Powell*, 74-1055, 44 U.S.L.W. 3485 (March 2, 1976).

agents were seeking evidence of. These matters may or may not have been sufficient to warrant suppression independently of the probable cause issue,[9] but that is not important now. What is important now, in light of the issue the Government seeks to frame, is that those matters raised below went straight to the issue of the "good faith" of its agents. And what is even more important is that the Government never answered those matters by affidavit or otherwise, never sought but in fact opposed an evidentiary hearing, and never set forth its good faith argument to the District Judge.

The Government then, when in the proper forum to establish good faith and with the opportunity to do it if it could, assiduously avoided the issue, even to the point of declining to answer allegations of bad faith. Of course, one reason for such reticence may have been that the law then, as it does now, makes good faith irrelevant where probable cause is absent.[10] But that is the very law which the Government says should be changed. Moreover, even under the Government's formulation, suppression is still justified where "the warrant had been procured in bad faith or on the basis of material misrepresentations" (Pet., pp. 11, 12). But bad faith and material misrepresentations are exactly what the respondents alleged. Since the Government admits those matters are relevant, what

9. See *United States v. Dunnings*, 425 F.2d 836, 839 (2d Cir. 1969), *cert. denied*, 397 U.S. 1002 (1970), and *United States v. Belcufine*, 508 F.2d 58 (1st Cir. 1974), concerning false material statements in a supporting affidavit. See *Stanford v. Texas*, 379 U.S. 476 (1965) and *Marron v. United States*, 275 U.S. 192 (1927) re the prohibition against general searches.

10. Except in the unusual settings of *Michigan v. Tucker*, 417 U.S. 433 (1974) and *United States v. Peltier*, 422 U.S. 531 (1975).

excuse can it give for not answering those allegations in the District Court?

Whatever the reason for its silence below, it puts the Government now in an awkward position. It seeks to frame what some may call an intriguing issue, but its case just doesn't permit it. It tells this Court now that bad faith and material misrepresentations are relevant, but it refused to face those issues when they were raised in the District Court. Its theory depends on "good faith," but it has already defaulted on that. Thus, the issue it tries to frame is purely hypothetical. Stripping away the rhetoric, the Government is simply telling this Court "we forgot to do something in the District Court, let us go back and do it." But when a defendant forgets to make his motion to suppress, at the proper time and place, he gets no second chance.[11] We suggest that the Government, when answering a motion to suppress, should be held to the same standard.

One good reason for holding the Government to that standard is the strong likelihood that the Government's failure to present its case at the proper time could result in prejudice to these respondents. Should this Court accept the Government's theory, the next step would be to remand to the District Court for a good faith evidentiary hearing. But at that hearing, witnesses would be testifying to events and states of mind[12] at

11. The motion to suppress must be made before trial. A defendant's failure to move timely constitutes a waiver of his objection unless he can show good cause for his failure. See Rule 12(b)(3) and (f), Federal Rules of Criminal Procedure; Wright, *Federal Practice and Procedure*: Criminal §191.

12. It would seem that under the Government's approach the subjective state of mind of the agent or agents would be a critical factor.

least a year old. Also, there is a good likelihood that witnesses necessary to establish the respondents' case will be unavailable.[13] Moreover, by that time the Government will have had the advantage of having over a year in which to formulate its answers to the respondents' allegations.

There is then, we suggest, a clear likelihood that the respondents would be at a disadvantage at a remanded hearing, particularly if they are to bear the burden of proof.[14] And the blame for this can only be placed with the Government. Any such prejudice the respondents may face could have been avoided, had the Government, consistent with the good faith theory it urges now, sought the hearing at the proper time.

2. The exclusionary rule was fashioned, and exists now, for the purpose generally of safeguarding the rights guaranteed by the Fourth Amendment. *United States* v. *Calandra*, 414 U.S. 338, 348 (1974). It may well be a "blunt instrument" as the Government puts it (Pet., p. 13), but it is the only instrument we know of that is capable of safeguarding those rights. The drastic modification of the rule urged by the Government would leave

13. The informant Athanasiou would be a critical witness at such a hearing and there is good reason to doubt his availability now. The Government held Athanasiou in custody as a material witness under $5,000 bail even after he surrendered himself. Then, even the Government doubted his availability for its case in chief. After the motion to suppress was granted, he moved to have his deposition taken and for release from custody under 18 U.S.C. §3149. His deposition was taken, and he was released in August of 1975. But he was not deposed on those matters which would be relevant to the suppression issue because the Government's good faith argument hadn't yet been raised.

14. Since the Government seems to say that good faith is evidenced simply because the agents went to the magistrate instead of searching on their own initiative, it would appear that the respondents would bear the burden of proving bad faith or material misrepresentations.

those rights unprotected. This would necessarily be the case because there is now no existing alternate remedy for the vindication of Fourth Amendment rights, and the Government, in its petition, has not suggested a realistic alternative.[15]

The single alternative remedy suggested by the Government is that the magistrate can be fired. But this is no realistic alternative. As the Circuit Court noted, there are other officials not subject to the Federal District Court's supervision who are authorized to issue warrants, and their removal is not easily accomplished (Pet. App. A, p. 12a). Moreover, as a practical matter, it is difficult to see how "rubber stamp" magistrates could ever be identified. Under the Government's theory, probable cause would be irrelevant unless a defendant can show bad faith or material misrepresentations. Defendants who cannot meet that hurdle may well be deterred from even bringing motions to suppress. Also, it would seem that on a motion to suppress, the District Judge's first inquiry would go to the issue of the agents' faith. In those cases where bad faith is not shown, there would be no need to consider probable cause. Thus, the magistrates' determination of probable cause would be shielded from judicial review except under very limited circumstances.

Since judicial review of magistrates' probable cause determinations must inevitably be curtailed under the

[illegible] Even assuming the exclusionary rule would not abolish it until a meaningful alternative is in place, see Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. of Chi. L. Rev. 665, 675-678 (1970); Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives*, 2 J. of Leg. Studies 243, 269-273 (1973); Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 429-431 (1974); Bivens v. *Six Unknown Named Fed. Narcotics Agents*, 403 U.S. 388, 416 (1971) (dissenting opinion of Chief Justice Burger).

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Government's proposal, the threat of being fired as a "rubber stamp" would not hang heavy. But even if there is more judicial review than we think, the proposed remedy still leaves some questions. Thus, how many mistakes would a magistrate be permitted before he could be called a "rubber stamp," and how flagrant, if at all, must his mistakes be? Also, what other considerations would be taken into account in the serious matter of removal? These are questions not susceptible to easy answer, and the Government offers no guidelines. Viewed in this light, the suggested alternative is really no remedy at all.

The Government says that acceptance of its position will prove a benefit by increasing the incentive for agents to go to a magistrate rather than search on their own initiative. Certainly going to a magistrate is the preferred procedure, and a rule which tends to deter warrantless searches is good. But in this context the cost for the added incentive is too high. The Fourth Amendment tells us that probable cause must exist before a warrant can issue, yet the Government's position would permit the issuance of a warrant irrespective of probable cause. This may well increase the incentive to go to a magistrate, but it surely provides no incentive to ensure that probable cause be present.

While the cost for this added incentive to seek a warrant is high, the need for it, we suggest, is not so high. Rules of substance tending to induce agents to opt for the magistrate are already on the books. Thus, the agents know that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established

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and well delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967); *Coolidge v. New Hampshire*, 403 U.S. 443, 454-455 (1971). Also, the agents know that their warrant applications are viewed not in a grudging or negative manner, *United States v. Ventresca*, 380 U.S. 102, 108 (1965), and that to obtain a valid warrant, they need only to show the probability of criminal activity and not a *prima facie* case. *Beck v. Ohio*, 379 U.S. 89, 96 (1964). And the agents know, too, that a reviewing court will show great deference to a determination of probable cause made by a magistrate, *Jones v. United States*, 362 U.S. 257, 270-271 (1960), and that any doubt will be resolved in favor of the warrant's validity. *United States v. Ventresca, supra*, 380 U.S. at 106.

These rules, along with others mentioned in the dissent below,[16] should provide agents with sufficient incentive to go to the magistrate. Whatever benefit could be derived along this line by accepting the Government's position would be minimal. Any such benefit, when balanced against the attendant dilution of the probable cause concept, is, we suggest, hardly worth the price.

The Government's argument draws heavily on selected passages from three recent decisions in which this Court declined to extend the exclusionary rule in different contexts. *United States v. Calandra*, 414 U.S. 338 (1974); *Michigan v. Tucker*, 417 U.S. 433 (1974); *United States v. Peltier*, 422 U.S. 531 (1975). In *Calandra* this Court declined to extend the rule to grand jury proceedings, reasoning that the rule's deterrent effect would be minimal when balanced against the harm to the grand jury system. It would be minimal because the evidence seized

16. Pet. App. A, pp. 22a-24a.

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under the defective warrant would, in any event, be inadmissible in a subsequent criminal trial of the search victim. This, it was felt, would negate any incentive to disregard the requirements of the Fourth Amendment. Thus, the holding in *Calandra*, premised as it was on application of the exclusionary rule at trial, lends little support to the Government's position.

The same is true for the holdings in *Michigan v. Tucker, supra*, and *United States v. Peltier, supra*. In *Tucker* this Court declined to extend the rule in a Fifth Amendment context and in *Peltier*, declined to extend it in a retroactivity context. The reasoning in both cases was that the rule's deterrent purpose would not be served because the Government agents had acted in good faith. However, in each case the good faith of the agents was evidenced by the fact that the agents had fully complied with the constitutional standards prevailing at the time of the arrest. By contrast, the good faith rule proposed here by the Government, assumes violation of those standards.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

s/ Stanley H. Wallenstein

SCHIANO & WALLENSTEIN
Attorneys for Respondents

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APPENDIX A — AFFIDAVIT OF STEVE KARATHANOS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

STEVE KARATHANOS and JOHN KARATHANOS,

Defendants.

75 Cr. 456

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

STEVE KARATHANOS, being duly sworn, deposes and says:

1. I am the President and sole stockholder of Steve's Pier I Restaurant, and I am a defendant in this case. I make this affidavit in support of a motion to suppress the evidence obtained as a result of the search of my Restaurant conducted on May 18, 1975.

2. I have read paragraph numbered one of the Affidavit For A Search Warrant signed by Criminal Investigator Neal Jacobs on May 16, 1975. To the best of my knowledge and

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recollection, only one of the eleven individuals named in that paragraph was apprehended on the premises of my Restaurant. That person was Michael Katsigiorgis, who from my records worked in the Restaurant as a chef from October 1970 to November 1, 1970. Although Katsigiorgis was picked up by Immigration on my premises, I know that he was never deported and is now a lawful permanent resident of the United States.

3. Of the other individuals named in paragraph numbered one of the Affidavit, my records indicate that Nikolos Tissanos, who worked under the name Pissanos, was employed from November 1970 through December 25, 1970. Victor Llanos, my records indicate, worked in my Restaurant under the name Alexandro Llanos from August 1970 to October 1970. He, I believe, is the same person as Victor Alexandro Llanos-Atunes named in the government Affidavit. Koastantinos Voulgaridis, I recall, worked in the Restaurant only one night and was picked up by the local police that night for having a fight with my brother Steve. I never saw him after he was picked up by the local police. To the best of my knowledge, neither Pissanos, Llanos nor Voulgaridis were picked up by Immigration on the Restaurant premises. As concerns the other individuals named in the government Affidavit, I have no recollection or record of them working in my Restaurant and no recollection of them being apprehended by Immigration on the Restaurant premises.

4. I have also read paragraph numbered two of the Affidavit For A Search Warrant. That paragraph states that Athanasios Athanasiou had been employed in my Restaurant from October of 1973 till Sunday, May 11, 1975 and that during

the last year and a half, he has resided in the basement of my Restaurant. Those statements are incorrect. The truth is that Athanasios Athanasiou did not work in my Restaurant until some time about the beginning of 1975. When he started to work in my Restaurant, he did not reside in the basement, but he lived in a rooming house with his wife. His wife left him some time ago, and he then asked me for permission to sleep in the Restaurant so that he could save money. I permitted him to sleep in the Restaurant about one or two weeks before he was fired. I fired him on May 11, 1975 because he was involved in an incident concerning sexual abuse of a child.

5. I inspected the premises of my Restaurant shortly after the search was conducted and while the Immigration investigators were still present. I saw that there was considerable damage done to one of the entrances where part of a door and a lock had been damaged. Also, I saw that the investigators had broken into my office, had gone through desk drawers and file cabinets and had left the cabinets open, taken out documents and left the documents strewn about. I can also state on information and belief that some of the same investigators who conducted the search of my Restaurant on the same morning also searched the home of one Vinnie Geraghty whose house is located about half a mile from my Restaurant, looking for illegal aliens. I am also told that the same investigators, on the same morning, searched the home of my brother, John Karathanos, whose house is located across the street from my Restaurant, also looking for illegal aliens.

Appendix A

STEVE KARATHANOS

Sworn to and subscribed before me

this 1 day of (illegible) 1975).

APPENDIX B — AFFIDAVIT OF JOHN KARATHANOS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

STEVE KARATHANOS and JOHN KARATHANOS,

Defendants.

75 Cr. 456

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOHN KARATHANOS, being duly sworn, deposes and says:

1. I am the brother of Steve Karathanos and am employed as a chef in Steve's Pier I Restaurant. I am a defendant in this case. I make this Affidavit in support of a motion to suppress the evidence obtained as a result of the search and seizure conducted in the Restaurant on May 18, 1975.

2. I recall quite vividly the morning of May 18, 1975. At about ten minutes before six that morning, as I was getting dressed, I heard a knock on my door. I opened the door and

there were seven men who turned out to be Immigration investigators. Four of them brushed past me, saying that they had complaints that there were illegal aliens in my home. Three of them remained stationed outside my home. They searched my entire house, found nothing and then left. At about the same time, I saw that they were also conducting a raid on the Restaurant, which is located across the street from my house. I have also been told by Vinnie Geraghty, who lives about two blocks from the Restaurant that some time earlier on that morning, at about 5:30 a.m., Immigration investigators searched his house for illegal aliens and found no one.

3. I have read paragraph numbered one of the Affidavit For A Search Warrant, signed by Criminal Investigator Neal Jacobs on May 16, 1975. To my knowledge and recollection, only one of the eleven individuals named in that paragraph was apprehended on the premises of the Restaurant. The person apprehended was Michael Katsigiorgis. He worked as a chef in the Restaurant and to my knowledge he was never deported and is now a permanent resident of the United States.

4. Of the other individuals named in paragraph numbered one of the Affidavit, the records of the Restaurant show that Nikolos Tissanos, whose last name is, I believe, Pissanos, worked in the Restaurant from November 1970 through December 25, 1970. Victor Llanos, whom I believe is the same person as Victor Alexandro Llanos-Atunea, worked in the Restaurant under the name Alexandro Llanos from August 1970 to October 1970. Koastantinos Voulgaridis worked in the Restaurant only one night for five hours. I specifically recall him

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Appendix B

because he challenged me to a fight and we did fight that evening off the Restaurant premises. Voulgaridis was locked up by the local police that evening and I never saw him again. To the best of my knowledge, neither Pissanos, Llanos nor Voulgaridis were picked up by Immigration on the Restaurant premises. I do not know whether any of the other individuals named in paragraph numbered one of the Jacobs Affidavit worked in the Restaurant, and I have no recollection of any such people having been apprehended by Immigration on the Restaurant premises.

5. I have also read paragraph numbered two of the Affidavit For A Search Warrant. In that paragraph it is stated that Athanasios Athanasiou worked in the Restaurant from October of 1973 till May 11, 1975 and that during the last year and a half he lived in the basement of the Restaurant. I know that statement is incorrect. I know that Athanasios Athanasiou did not start to work in the Restaurant until the beginning of 1975. At that time he lived in a rooming house with his wife. She left him some time ago. At about the time his wife left he began sleeping in the Restaurant. This was about one or two weeks before he was fired. My brother Steve Karathanos fired him on May 11, 1975 because he had attempted to sexually abuse a child.

JOHN KARATHANOS

Sworn to and subscribed before me

this day of , 1975.

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APPENDIX C — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

[Supplemental Transcript, pp. 35, 36]

* * *

defendants' Fourth Amendment rights.

THE COURT: Mr. Wallenstein, I hope you are not going to re-argue?

MR. WALLENSTEIN: No, your Honor, I have nothing further to argue.

MR. CORCORAN: We don't use warrants to authorize the arrest of illegal aliens. In a case such as this we have probable cause to enter the premises. 1357 does not come into this as Mr. Wallenstein suggests. The authority is interrelated to the illegal aliens in paragraph (a)(2). If the Government has reason to believe that the alien is here by violation of the law it is clear in the statute that the procedure is that he does not have to have a warrant to authorize his going into the premises. The Government has authority given to them beyond that.

If the Government has reason to believe they are on certain premises they can at least search them out without a warrant, if they did go out without a warrant.

We feel that the Government has done nothing wrong by taking pictures of or gathering other evidence of harboring while they were there.

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Appendix C

One case relied upon by the defendants for this charge that the Government was wrong in what they did [36] here, is the case of Caglavorsi (phonetic) 291 Fed. 262. There is authority in that case that is quite a distinguishable fact. Those facts involve not only a warrant but also the basis for a frisk of a man.

That is the authority that was used when we went into that restaurant.

The defense attorneys are claiming that the Government went through files of the defendants at Steve's Pier restaurant when they were there. That the officers looked in files.

If the defense attorneys had started out their argument by saying that the Government had property that should be properly suppressed and was found without a legal warrant and that it was suppressible because it went beyond the scope of the warrant because there was no authorized search for any such material.

THE COURT: Thank you, gentlemen.

Decision reserved until my memorandum of law is completed.

MR. CORCORAN: The Government would like to see these people released. We have these witnesses at West Street. We would like to go to trial next week. These witnesses have been in jail for some six or seven weeks now. And I feel it is grossly unfair to them. It is grossly unpardonable.

* * *

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In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1402

UNITED STATES OF AMERICA, PETITIONER

v.

STEVE KARATHANOS AND JOHN KARATHANOS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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1. Respondents contend (Br. in Opp. 6-8) that this case is an inappropriate vehicle for review of the question presented because the claim of inapplicability of the exclusionary rule when the government has procured a warrant in good faith was not presented to the district court. At a hearing before the district court on July 15, 1975, however, the Assistant United States Attorney stated in opposition to respondent's motion to suppress (Tr. 52-53):[1]

> [S]uppression has to do with the wrongdoing on the part of police officers. And the suppression—that defects attributable to an affidavit and a warrant and tc other defects, which do not go to wrongdoing by police officers and authorities executing

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[1]The page of the transcript on which this excerpt appears was cited incorrectly at Pet. 5, n. 1. We are lodging the transcript of the hearing before the district court with the Clerk of this Court.

the warrant should not be held against the Government. It would serve no deterrent effect.

The exclusionary rule issue also was fully briefed by the parties in the court of appeals and constituted a significant part of that court's opinion (see Pet. App. 13a-18a). Indeed, the government's contention that the remedy of suppression should not be applied in this case was the subject of a concurring opinion by Judge Oakes (Pet. App. 29a-30a) and was the alternative ground on which Judge Van Graafeiland, dissenting below, would have reversed the order of the district court (Pet. App. 26a-29a). Thus, there is no procedural impediment to review by this Court.

Nor is there merit to respondents' related contention (Br. in Opp. 8-9) that the petition should be denied because they may have been prejudiced by the government's failure to request an evidentiary hearing in the district court on the issue of good faith. As respondents have conceded in this Court (Br. in Opp. 7) and in the court of appeals (Br. 30, n. 19), it is most unlikely that the district court would have acceded to that request after having determined that the search warrant was issued without probable cause. But, in any event, the question whether respondents may have been prejudiced by the delay or whether the prejudice, if any, is properly attributable to the government are matters that would be open on remand if this Court were to reverse the judgment of the court of appeals.

2. Respondents' argument on the merits (Br. in Opp. 9-13) stresses the continued necessity for an unyielding application of the exclusionary rule whenever law enforcement officers have acted without probable cause. The petition sets forth our contrary position that, in view of the substantial societal costs from the suppression of rel-

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evant and probative evidence of crime, a more discriminating imposition of this judicially-created remedy is required. While we see no reason to repeat these views, several points presented by respondents deserve rebuttal.

a. The linchpin of respondents' contentions is that, under the government's proposal, the issue of probable cause would be shielded from judicial scrutiny unless the defendant could demonstrate that the warrant was procured through bad faith or material misrepresentations. On the contrary, we have explicitly stated (Pet. 11) that suppression remains a proper sanction, regardless of the the subjective good faith of the law enforcement officers or the issuing magistrate, when the showing of probable cause was so minimal "as to render official belief in its existence entirely unreasonable." *Brown* v. *Illinois*, 422 U.S. 590, 610-611 (Powell, J., concurring). The district court, therefore, would still be required to determine whether probable cause existed for the issuance of the warrant; only if it answered that question in the negative would the court be obliged to consider the additional factors outlined in our petition in determining whether to apply the drastic remedy of suppression. Hence, there is no reason to believe that police would seek or could obtain warrants absent substantial evidence of crime, that defendants would be deterred from bringing motions to suppress, or that the courts would be ignorant of the identities of those magistrates acting as a "rubber stamp."

b. We noted in our petition (p. 13) that alternatives to evidentiary suppression exist to control the conduct of federal magistrates. It is no answer to this contention to point out that other judicial officers, not subject to the district court's supervision, also are empowered to issue warrants. This case involves a warrant issued by a

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United States Magistrate, whose powers and tenure are subject to direct control by the federal courts. But more importantly, we see no reason why the exclusionary rule, which has traditionally been limited to "those areas where its remedial objectives are thought most efficaciously served," *United States* v. *Calandra*, 414 U.S. 338, 348, must be applied to disparate situations in the same fashion, or why the rule's utility should not depend upon circumstances such as whether a state or federal court has issued the warrant. Perhaps the Court would conclude that warrants improperly issued by state judges demand a different sanction because of the absence of the more direct remedy available against federal magistrates; but that is a problem for another case.

c. Respondents correctly note that law enforcement officers already have incentives to seek judicial authorization before undertaking a search; they draw from this the conclusion that there is no need to offer additional incentives toward that end (Br. in Opp. 11-12). It appears, however, that a warrant was unnecessary here. See Pet. 10, n. 6. Moreover, warrants are not required in other contexts in which significant invasions of a citizen's liberty and privacy may occur. See *United States* v. *Watson*, No. 74-538, decided January 26, 1976.

3. In sum, although respondents contend that the benefits to be gained from the approach to the exclusionary rule presented in our petition would be slight, they fail to suggest any corresponding benefits to the criminal justice system from the suppression of relevant, probative evidence in cases such as this one. Whichever may ultimately be the better view, the case presents important and recurring questions that should be resolved by this Court.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

MAY 1976.

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